KHOO EWE CHIN

v.

YIKED PENGKALAN KUNDOR SDN BHD

HIGH COURT MALAYA, ALOR STAR
MOHD SOFIAN ABD RAZAK J
[CIVIL SUIT NO: 22-33-2003]
27 MARCH 2008

CIVIL PROCEDURE: *Action - Disposal of case on point of law - Rules of the High Court 1980, O. 14A - Question posed to court for determination and interpretation - Whether suitable and appropriate to be considered within scope - Rules of the High Court 1980, O. 33 r. 2*

CIVIL PROCEDURE: *Action - Disposal of case on point of law - Rules of the High Court 1980, O. 14A - Whether there was actionable privity of contract between plaintiff and defendant - Whether there was cause of action against defendant - Whether defendant company liable in contract to plaintiff*

The plaintiff entered into a sale and purchase agreement (hereinafter called the tripartite JVA) with the defendant whereby the plaintiff agreed to buy and the defendant agreed to sell a piece of property at the purchase price of RM135,002 ('the said property'). In accordance with the tripartite JVA, the plaintiff had to date made payment of RM45,002 to the defendant. However, on or about 1 August 2002, several houses were constructed on the said property without the consent of the plaintiff. After enquiries and complaints made to the Ministry of Housing, the plaintiff came to know that the defendant had entered into an agreement with a third party. The plaintiff averred that the second agreement with the third party had prejudiced his beneficial rights on the said property. The defendant contended that it had entered into the tripartite JVA and had given consent to Caymen Development (Kedah) Sdn Bhd to enter into a joint venture agreement with Yayasan Islam Negeri Kedah. The defendant denied that terms of the agreement as alleged by the plaintiff were binding on the defendant. The defendant further submitted that it was not liable to the plaintiff as there was no consideration given. Upon signing the agreement, the defendant handed over the said property to Caymen Development (Kedah) Sdn Bhd. According to the defendant, in view of the fact that the terms of the tripartite

JVA was between the plaintiff and Caymen Development (Kedah) Sdn Bhd, the plaintiff had no *locus standi* to claim against the defendant. In the defendant's encl. 13, the question on point of law or construction of any document for the court's determination was the defendant's liability pursuant to the agreement dated 25 March 1996 be determined as an issue of law on the interpretation of the terms of the agreement. The plaintiff, however, took a different view in that the issue of liability under the tripartite JVA should be determined by way of full trial and by calling witnesses. According to the plaintiff, there were dispute of facts between the parties and was not suitable for an application by way of O. 14A Rules of the High Court 1980.

Held (allowing defendant's application and dismissing plaintiff's writ and statement of claim):

(1) The question posed to the court for its determination and interpretation of the tripartite JVA was suitable and appropriate to be considered within the scope of O. 14. Looking at the tripartite JVA in the recital it clearly described Caymen Development (Kedah) Sdn Bhd as the vendor, the plaintiff as the purchaser and the defendant as the proprietor. The temporary receipts annexed to the affidavit in support of encl. 13 showed that the payment totaling the sum of RM45,002 were made in favour of Caymen Development (Kedah) Sdn Bhd. (paras 13, 18 & 20)

(2) The plaintiff did not plead in the statement of claim upon which clause reliance was relied on. Neither was it the pleaded case of the plaintiff that privity was created by course of conduct. Looking at the tripartite JVA, in such a situation *per se* does not bring about or establish any actionable privity of contract between the plaintiff and the defendant. The proper cause of action was for the plaintiff to sue the vendor *ie* Caymen Development (Kedah) Sdn Bhd and not the defendant. Consequently there was no cause of action against the defendant. (paras 24 & 25)

(3) On the issue of the vendor having 399998 shares in the defendant's company and the signatory for the vendor and the defendant's company being the same person, namely one Teh Bee Chen, the legal relationship between the vendor and the defendant company was that for all intent and purposes, both

were separate legal entities, although the vendor held a majority share in the defendant's company. It does not necessarily mean that the defendant's company was liable in contract to the plaintiff. (paras 26 & 28)

Case(s) referred to:
People's Insurance Co. (M) Sdn Bhd v. People Co Ltd [1986] 1 MLJ 68 ***(refd)***
Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(refd)***
Ribaru Bina Sdn Bhd & Anor v. Bukit Kausar Development Sdn Bhd [2003] 5 AMR 165 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14A, O. 33 r. 2

For the plaintiff - M/s Andrew Paul & Assoc
For the defendant - M/s Nadarajan & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Sofian Abd Razak J:

[1] On 26 September 2006 the court heard the defendant's summons in chambers (encl. 13) dated 3 January 2006 pursuant to O. 14A and O. 33 r. 2 of the Rules of the High Court 1980 (hereinafter called the 'RHC'). Upon reading encl. 13 and perusing the affidavit in support (encl. 14) and the affidavit in reply by the plaintiff (encl. 15) and the written submissions by both parties, the court allowed the defendant's application and dismissed the plaintiff's claim with costs. The plaintiff who was dissatisfied with the said decision has since filed an appeal.

The Pleadings

Plaintiff's Claim

[2] On or about 25 March 1996, the plaintiff entered into a sale and purchase agreement (hereinafter called the tripartite JVA) (exh. 'N1') with the defendant whereby the plaintiff agreed to buy and the defendant agreed to sell property held under H.S.(D) 1789/95 No. Lot PT 9254, Mukim Pengkalan Kundor, Daerah Kota Setar, Kedah at the purchase price of RM135,002 (hereinafter called the 'said property').

[3] *Inter alia* the salient terms of the tripartite JVA are as follows:

a) the purchaser is the plaintiff and the vendor is the defendant.

b) the defendant had represented to the plaintiff that the defendant was at all material times the beneficial owner and was in the position to sell the 'said property' and acting upon the said representation, the plaintiff entered into the tripartite JVA.

[4] The other expressed or implied terms of the tripartite JVA are as follows:

a) Upon signing the tripartite JVA, the plaintiff was required to pay a deposit of RM13,500.20 being the 10% of the purchase price to the defendant.

b) The balance purchase price shall be paid by way of progress payment pursuant to the schedule.

c) The plaintiff was entitled for specific performance of the tripartite JVA if the defendant failed to transfer the said property to the plaintiff in accordance with the provisions of the tripartite JVA.

d) In accordance with the tripartite JVA, the plaintiff had to date made payment of RM45,002 to the defendant, particulars thereof are as follows:

4 September 1994	RM7,000
24 September 1994	RM6,500
18 May 1996	RM20,250.30
26 May 1996	RM6,750.30
3 December 1997	RM4,501.40

e) The plaintiff upon payment of RM13,500 had entered a private caveat presentation No: 22271/1998.

f) On or about 1 August 2002 several houses were constructed on the said property without the consent of the plaintiff.

g) After enquiries and complaints made to the Ministry of Housing, the plaintiff came to know that the defendant had entered into an agreement with a third party.

h) The plaintiff averred that the second agreement with the third party had prejudiced his beneficial rights on the said property.

[5] In its statement of defence, the defendant avers as follows:

1) The defendant had entered into the tripartite JVA and had given consent to Caymen Development (Kedah) Sdn. Bhd. to enter into a joint venture agreement with Yayasan Islam Negeri Kedah.

2) The defendant denied that terms of the agreement as alleged by the plaintiff are binding on the defendant. The defendant is not liable to the plaintiff as there was no consideration given to the defendant.

3) Save and except that the defendant was aware of the purchase price agreed between the plaintiff and Caymen Development (Kedah) Sdn. Bhd. for the said property but denied that the defendant was the vendor in accordance with the terms of the agreement.

4) Save and except for the terms of the said agreement, the defendant denied receiving any payment from the plaintiff.

5) Upon signing the agreement, the defendant handed over the said property to Caymen Development (Kedah) Sdn. Bhd.

6) The defendant were informed that the said tripartite JVA was to develop the said property into an industrial estate but could not materialize due to factors beyond the control of Caymen Development (Kedah) Sdn. Bhd. In view of the fact that the terms of the tripartite JVA was between the plaintiff and Caymen Development (Kedah) Sdn. Bhd., the plaintiff had no *locus standi* to claim against the defendant.

7) The tripartite JVA to develop the said property into an industrial estate could not be done by Caymen Development (Kedah) Sdn. Bhd, due to the factors beyond its control, although the status of the said property had been changed. The liability of the defendant was to Caymen Development (Kedah) Sdn. Bhd.

A 8) The defendant averred that under the tripartite JVA entered between the defendant and Caymen Development (Kedah) Sdn. Bhd., the obligation to execute the Memorandum of Transfer was only at the request of Caymen Development (Kedah) Sdn. Bhd. and not to the plaintiff.

B

The Law On O. 14A RHC

[6] It is appropriate at this juncture that the scope and applicability of O. 14A RHC be looked at and for purposes of easy reference the said order is hereby reproduced:

C

(1) The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that:

D

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

E

(2) Upon such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The court shall not determine any question under this order F unless the parties have had the opportunity of being heard on the question.

[7] In the defendant's encl. 13 the question on point of law or construction of any document for the court's determination is:

G **[8]** The defendant's liability pursuant to the agreement dated the 25 March 1996 be determined as an issue of law on the interpretation of the terms of the agreement before the court hears evidence by the plaintiff of its losses.

H **[9]** The defendant by way of an O. 14A application sought the court's determination with regard to the interpretation of cls. 1 & 6 of the tripartite JVA dated 25 March 1996 entered between the parties. Of particular relevance would be the construction to be given to cls. 1 and 6 of the agreement to determine whether the I defendant had to deliver vacant possession of the industrial lot distinguished as property held under H.S.(D) 1789/95 No. PT 9254, Mukim Pengkalan Kundor, Daerah Kota Setar.

[10] It was the submission of the learned counsel for the defendant that this vexed question as to whether the defendant had to deliver vacant possession to the plaintiff is a question purely for the interpretation and construction of the tripartite JVA which could be determined by the court under O. 14A RHC.

[11] The learned counsel for the plaintiff took a different view in that the issue of liability under the tripartite JVA should be determined by way of full trial and by calling witnesses. It was not suitable that the issue be determined by way of the court's interpretation and determination. There are disputes of facts between the parties and not suitable for an application by way of O. 14A RHC.

[12] In *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337, the Court of Appeal observed that:

> In our view even if the case appears to be or is complicated it does not mean that the court must shun away from considering the applicability of Order 14A and Order 33 rule 2 in relation to the questions of law posed which are clear and definite and the issues are clear cut. Real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then to apply, the relevant rule to the facts as found.

[13] In my view the question posed to the court for its determination and interpretation of the tripartite JVA dated 25 March 1996 is suitable and appropriate to be considered within the scope of O. 14.

Finding Of The Court

[14] For purposes of determining and interpreting cls. 1 and 6 of the tripartite JVA, the court first of all looked at the parties to the agreement. It can be seen that Caymen Development (Kedah) Sdn Bhd was described as the vendor, the plaintiff as the purchaser and the defendant as the proprietor. In the recital, the vendor was described as having a joint-venture with Yayasan Islam Negeri Kedah to develop a commercial cum industrial project known as Sri Tandop Industrial Park on the land acquired or to be acquired for the said development.

[15] The recital also states that the vendor agrees to sell and the purchaser agrees to purchase all the vacant industrial lot with vacant possession.

[16] In the preamble of the agreement in cl. I, agreement to sell states:

> 1) In consideration of the purchase price stipulated in s. 5 of the First Schedule hereto being paid by the purchaser in the manner and within the time as set out in the Second Schedule hereto, the vendor hereby agrees to sell and the purchaser hereby agrees to purchase the said property free from all charges and encumbrances but subject to all conditions of title whether expressed or implied contained in the document of title to the said property at the price referred to in s. 5 of the First Schedule and subject to the terms and condition hereinafter contained.

[17] In cl. 6 of the agreement, where it stipulates:

> 2) that upon payment of the balance purchase price within the time stipulated in the Second Schedule hereto the purchaser shall immediately be entitled to vacant possession of the said property and to the rents and profits thereof and shall likewise from such date be liable to outgoings payable thereon, such as rents and profits and outgoings to be apportioned if necessary.

[18] The court is of the considered opinion that looking at the tripartite JVA in the recital it clearly described Caymen Development (Kedah) Sdn Bhd as the vendor and the plaintiff as the purchaser and the defendant as the proprietor.

[19] The defendant argued that there is no privity of contract between the purchaser and the defendant, who was at the material time the proprietor of the said property. On the other hand, the privity of contract existed between Caymen Development (Kedah) Sdn Bhd as a vendor and the plaintiff as the purchaser.

[20] The temporary receipts annexed to the affidavit in support of encl. 13 and marked as exh. "N2' show that the payment totaling the sum of RM45,002 were made in favour of Caymen Development (Kedah) Sdn Bhd.

[21] The plaintiff in its written submission submitted that the basis for suing the defendant was because the defendant was the registered owner of the said property which is the subject matter of the dispute between parties. The plaintiff further submitted that the defendant had given consent to the vendor to have the said land converted into an industrial and residential land. It was because of the consent to convert the status of the said property that had induced the plaintiff to willingly perform his obligation to the tripartite JVA.

[22] The other issue raised by the plaintiff was that a company search conducted shows that the vendor holds 399998 shares in the defendant's company and is the signatory to the tripartite JVA for both the vendor and the defendant's company being the same person namely, one Teh Bee Chen. This shows that the defendant's company has a direct interest in the tripartite JVA.

[23] The court is of the view that looking at the pleadings, it is obvious that the plaintiff did not plead in the statement of claim that there existed a contractual relationship between the plaintiff and the defendant.

[24] The plaintiff did not plead in the statement of claim upon which clause reliance was relied on. Neither was it the pleaded case of the plaintiff that privity was created by course of conduct. Looking at the tripartite JVA, in such a situation *per se* does not bring about or establish any actionable privity of contract between the plaintiff and the defendant.

[25] The proper cause of action is for the plaintiff to sue the vendor ie, Caymen Development (Kedah) Sdn Bhd and not the defendant. In this regard, the court agrees with the learned counsel for the defendant that there is no privity of contract and consequently no cause of action against the defendant, (see *Ribaru Bina Sdn Bhd & Anor v. Bukit Kausar Development Sdn Bhd* [2003] 5 AMR 165).

[26] On the issue of the vendor having 399998 shares in the defendant's company and the signatory for the vendor and the defendant's company being the same person namely, one, Teh Bee Chen, the court is of the view the legal relationship between the vendor and the defendant company is that for all intent and purposes, both are separate legal entities, although the vendor holds a majority of shares in the defendant's company.

[27] In this regard reference is made to the case of *People's Insurance Co. (M) Sdn Bhd v. People Co. Ltd* [1986] 1 MLJ 68 where the brief facts was the People's Insurance Company (M), a Malaysian company, was a subsidiary of the People's Insurance Col. Ltd registered in Singapore. Four senior officers of the holding (parent) company were also directors of the subsidiary. The auditors of the subsidiary company had expressed a view that the sum of $2,001.725 might not be sufficient to meet claims arising from such policies. The matter was placed before the Board Meeting of the subsidiary where at the instance of those four directors it was resolved that the parent company would guarantee any shortfall in excess of $2,001,725. There was a shortfall of $2,817,395 and the subsidiary company sought to recover the amount from the parent company. The court held that the parent and the subsidiary companies are two separate legal entities. The officers of the parent company who are on the board of the subsidiary are not representatives of the parent company but sit at the board meeting as directors and agent of the subsidiary and the resolution of the Board of Directors of the subsidiary does not bind the parent company. It did not constitute a contract between the parties.

[28] Applying the above stated principles to the facts of the instant case, the court is of the view that the fact the vendor holds the majority shares in the defendant's company and the same person is the signatory for both the vendor and the defendant's company does not necessarily mean that the defendant's company is liable in contract to the plaintiff.

[29] For the reasons as adumbrated above, the court allowed the defendant's application (encl. 13) and hereby dismissed the plaintiff's writ and statement of claim with costs.